

U.S. DEPARTMENT OF LABOR

SECRETARY OF **LABOR**
WASHINGTON. D.C.

DATE: September 29, 1993
CASE NO. **86-CTA-6**

IN THE MATTER OF

U.S. DEPARTMENT OF LABOR,

COMPLAINANT,

v.

YA-KA-AMA INDIAN EDUCATION
AND DEVELOPMENT, INC.,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises under the Comprehensive Employment and Training Act (CETA or Act), 29 U.S.C. §§ 801-999 (Supp. V 1981), and the implementing regulations at 20 C.F.R. Parts 675-80 (1990). ^{1/}

BACKGROUND

The Grant Officer excepted to that part of the March 25, 1988, Administrative Law Judge's (ALJ) Decision and Order (D. and O.) which waived repayment of **\$164,277.00** in disallowed CETA

^{1/} CETA was repealed effective October 13, 1982 and replaced by the Job Training Partnership Act, 29 U.S.C. §§ 1501-1791 (1988), but CETA administrative or judicial proceedings pending as of that date were not affected. 29 U.S.C. § 1591(e).

1990 **was** the last year that CETA regulations were published in the Code of Federal Regulations.

grant costs claimed by the Respondent, Ya-Ka-Ama Indian Education and Development, Inc. (Ya-Ka-Ama or Grantee). The disallowed costs resulted from Ya-Ka-Ama's failure to produce or adequately reconstruct missing organizational records and the Department auditors' determination that most of the available records were unauditable. The ALJ affirmed the Grant Officer's determination that Ya-Ka-Ama was unable to substantiate the eligibility of certain CETA participants; that Ya-Ka-Ama employed a relative of a member of the Board of Directors in violation of the anti-nepotism regulation; and the chaotic state of Ya-Ka-Ama's books and records was indicative of improper accounting methods and maintenance of records to insure that CETA grant funds had been expended for grant purposes. The ALJ agreed that these objective findings were not in accord with the relevant pertinent regulations. D. and O. at 3.

The ALJ concluded, however, that because the auditors did not allege any findings of fraud during the audit period, that he had the authority to waive the Department's recoupment of the disallowed costs. D. and O. at 5. The ALJ relied in part, on the general prescription in the Ninth Circuit Court of Appeals' remand decision in Quechan Indian Tribe v. U.S. Dep't of Labor, 723 F.2d 733 (1984), "to consider the 'equities'. .. prior to ordering the repayment of disallowed or questioned costs", as well as the authority, found in the regulations at 20 C.F.R. § 676.88(c), to allow otherwise misspent funds. D. and O. at 4.

DISCUSSION

The courts have held that CETA section 106(d) authorizes Secretarial discretion to order repayment of disallowed costs as a corrective action, ^{2/} or to waive recoupment of disallowed CETA costs, provided such discretion is exercised in accordance with the Act and the implementing regulations. ^{3/} See Action, Inc. v. Donovan, 789 F.2d 1453, 1459-60 (10th Cir. 1986); In the

^{2/} The applicable portion of Section 106(d) provides: "If the Secretary concludes that any recipient of funds under this chapter is failing to comply with any provisions of this chapter . . . the Secretary shall have authority to . . . order such sanctions or corrective actions as are appropriate, including the repayment of misspent funds. . . ."

29 U.S.C. § 816(d)(1) (emphasis added).

^{3/} 20 C.F.R. § 676.88 provides as follows:

(c) Allowability of certain questioned costs. In any case in which the Grant Officer determines that there is sufficient evidence that funds have been misspent, the Grant Officer shall disallow the costs, except that costs associated with ineliaible participants and public service employment programs may be allowed when the Grant Officer finds:

- (1) The activity was not fraudulent and the violation did not take place with the knowledge of the recipient or the subrecipient; and
- (2) Immediate action was taken to remove the ineligible participant; and
- (3) Eligibility determination procedures, or other such management systems and mechanisms required in these regulations, were properly followed and monitored; and
- (4) Immediate action was taken to remedy the problem causing the questioned activity or ineligibility; and
- (5) The magnitude of the questioned costs is not substantial.

(Emphasis added).

Matter of Worcester CETA Consortium, Case No. 82-CETA-A-166, Sec. Final Dec. and Order, June 24, 1992, slip op. at 3-5.

The regulations implementing Section 106(d) provide that if disallowed costs associated with ineligible participants and public service employment programs are to be allowed, the Grant Officer must determine that the five requisite conditions are present. Chicano Education and Manpower Services v. U. s. Dep't of Labor, 909 F.2d 1320, 1327 (9th Cir. 1990). (Secretary promulgated 20 C.F.R. § 676.88(c) to implement the "**special circumstances**" language of Section 106(d)(2)). An agency is required to follow its own regulations, particularly since the exception to the statutory presumption in favor of repayment is narrow, and the Secretary need not go beyond the factors covered by the regulation); Blackfeet Tribe v. U.S. Dep't of Labor, Case No. 85-CPA-45, Sec. Final Dec. and Order, Dec. 2, 1991, slip op. at 4; U.S. Dep't of Labor v. Rockingham/Strafford Employment and Training Consortium, Case No. 81-CTA-363, Sec. Dec. and Order of Remand, Mar. 11, 1991, slip op. at 3-4.

Only \$12,733 of the disallowed costs involve questioned participant eligibility and are therefore subject to the waiver provision. Joint Exhibits 1 and 2. The balance of the disallowed costs are attributable to **Ya-Ka-Ama's** inadequate administration and management of the program and the nepotism charge and are therefore beyond the scope of the recoupment waiver provision.

The ALJ waived recoupment of all of the disallowed costs based on the auditors not alleging any findings of fraud with regard to Ya-Ka-Ama's inadequate record keeping, and his finding that the Department of Labor did not provide sufficient guidance to Ya-Ka-Ama's board regarding necessary accounting procedures. D. and O. at 4. The ALJ implicitly found that Ya-Ka-Ama failed to meet the required regulatory condition to maintain and monitor the management systems and mechanisms necessary to adequately administer its CETA program. Id. at 3. Further, Ya-Ka-Ama did not remove the ineligible participants or take immediate action to remedy the problem causing the questioned activity, therefore it failed to meet two other requirements of the regulation necessary to waive the recoupment of disallowed costs. See Rockingham/Strafford, slip op. at 4-5; Central Tribes of the Shawnee Area, Inc. v. U.S. Dep't of Labor, Case No. 85-CPA-17, Sec. Final Dec. and Order, Dec. 14, 1989, slip op. at 3-5; California Indian Consortium, Case No. 85-CTA-124, Sec. Final Dec. and Order, Oct. 25, 1988, slip op. at 6.

The ALJ's determination that the "special circumstances" language in Section 106(d)(2) obligated him to consider such special circumstances in this case, D. and O. at 4, was in error, since the "special circumstances" phrase pertains only to costs arising under public service employment programs specified in Section 106(d)(2). Such consideration is not obligatory with regard to other instances which result in disallowed costs. See Chicano, 909 F.2d at 1326.

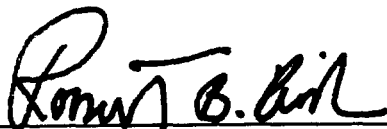
A CETA grantee's failure to secure and **maintain** adequate program and financial records for review by **Government** auditors may appropriately result in a determination that the grant funds were misspent. See City of Oakland v. Donovan, 703 F.2d 1104, 1107, modified 707 F.2d 1013 (9th Cir. 1983) (where a CETA grantee can only show the results of a program and cannot provide adequate evidence to show how and where the grant monies were spent, this failure **supports** a determination that the Act was violated); Montgomery County v. Maryland v. U.S. Dep't of Labor, 757 F.2d 1510 (4th Cir. 1985) (the burden of producing documentation to support its CETA expenditures is on the grantee).

After reviewing the case record, I am persuaded that there is no reason to excuse Ya-Ka-Ama's failure to maintain the organization's program and financial records. The records were apparently either misplaced or taken when the organization underwent personnel changes. The security of an organization's records in times of change is not an unusual responsibility for its administration. There is nothing in the record to suggest that to do so was beyond the **Ya-Ka-Ama** Board of Directors' control, or of its program managers. The Department cannot be faulted for the sorry state of Ya-Ka-Ama's records, even if I accept the **ALJ's** determination that there was an untimely delay in transmitting a copy of the audit report to the Grantee. The mishandling of the records occurred long before the audit took place, let alone the issuance of the report.

ORDER

That part of the **ALJ's** order of March 15, 1988 waiving repayment of **\$164,277.00** is REVERSED. The **Ya-Ka-Ama** Indian Education and Development, Inc. is ordered to repay to the u.s. Department of Labor **\$164,277.00** from non-Federal funds. Milwaukee, Wisconsin v. Donovan, 771 **F.2d** 983, 993 (7th Cir. 1985).

SO ORDERED.



Secretary of Labor

Washington, D.C.

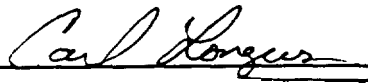
CERTIFICATE OF SERVICE

Case Name: In the Matter of U.S. Department of Labor v.
Ya-Ka-Ama Indian Education and Development, Inc.

Case No. : 86-CTA-6

Document : Final Decision and Order

A copy of the above-referenced document was sent to the following
persons on SEP 29 1993.



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